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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 523

RAYMOND A. BIGGS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

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TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional Amendment Involved 2

Procedural History of the Case 3

Summary Statement of Matter Involved 4

Reasons for Granting the Writ 9

Conclusion 14

APPENDIX:

Opinion of the United States Court of Appeals for the Sixth Circuit 15

Judgment of the Court of Appeals 22

TABLE OF AUTHORITIES.

Cases.

Benes v. Canary, 224 F. (2d) 470 (1955) 9, 11, 12

Centracchio v. Garrity, 198 F. (2d) 382 (1952) 9, 11, 12

Chieftain Pontiac Corp. v. Julian, 209 F. (2d) 657 (1954) 11

Fried, In re, 161 F. (2d) 453 (1947) 9

U. S. v. Shotwell Mfg. Co., 225 F. (2d) 394 (1955) 12

Constitution.

United States Constitution, Amendment V 2, 3

Statute.

28 U. S. C. A., Section 1254(1) 2

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To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Raymond A. Biggs, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 5, 1957, which affirmed the judgment of the District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW.

The opinion of the Court of Appeals, Appendix p. 15, *infra*, has not yet been officially reported.

The Findings of Fact and Conclusions of Law of June 15, 1956 of the U. S. District Court for the Eastern District of Michigan, Southern Division, have not yet been officially reported, but appear at p. 308a of the Record (nine additional copies of which are filed herewith).*

* The entire printed record below certified by the Court of Appeals is for convenience hereinafter cited as "R. ."

On July 29, 1957 the Court of Appeals entered an order staying mandate for thirty days, provided however, if application for writ of certiorari were filed in the United States Supreme Court within said period, then the stay shall operate until final disposition of the case by the United States Supreme Court. On August 28, 1957, the Court of Appeals extended the stay of mandate until October 3, 1957 by amendment to the order of July 29, 1957.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

QUESTION PRESENTED.

Does the use as evidence against the petitioner in a grand jury proceeding or criminal prosecution of information derived from certain account books, which the petitioner delivered to representatives of the Bureau of Internal Revenue upon the assurance of the then Collector of Internal Revenue that if said books were so delivered petitioner would not be prosecuted criminally, violate petitioner's right against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL AMENDMENT INVOLVED.

AMENDMENT V of the United States Constitution provides in pertinent part:

> * * * "nor shall be compelled in any criminal case to be a witness against himself." (U. S. C. A. 1944 ed. Vol. 1, p. 102.)

PROCEDURAL HISTORY OF THE CASE.

Petitioner filed a petition in the District Court of the United States for the Eastern District of Michigan, Southern Division, seeking to suppress certain evidence in the form of two blue Lawyers Handy Books which the petitioner claimed had been obtained from him in violation of his rights under the Fifth Amendment to the Constitution of the United States. At the time the petition was filed no indictment had as yet been returned against the petitioner although, as the petition alleged, the United States Attorney was about to present such evidence to the Grand Jury as the basis for an indictment of the petitioner for filing false and fraudulent income tax returns for the years 1946 and 1947. The prayer of the petition was that the United States Attorney and his assistants and agents be restrained from using as evidence before the Grand Jury proceeding or in any criminal prosecution of the petitioner any information obtained from petitioner's said books, and from using as evidence any information obtained directly or indirectly from or as a result of information shown in said books; and that such information be suppressed for the purpose of any such proceedings or prosecution.

The United States filed a motion to dismiss the petition on the ground that (1) the petition was lacking in equity, and (2) the issue presented was prematurely raised.

The motion was argued by counsel and, after consideration, the lower court entered an order dismissing the petition for want of equity on March 10, 1953 (R. 12a). On the same day, but after the entry of the order of the District Court dismissing the petition, an indictment was returned against petitioner charging him with attempting to defeat and evade his income taxes for the years 1946 and 1947 and those of his wife for the year 1947 (R. 2a).

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit and that Court on February 19, 1954 in Case No. 11,904 denied the government's motion to dismiss the appeal. The case was remanded to the District Court with instructions to pass upon the merits of the original petition to suppress the evidence (R. 16a).

On October 11 and 12, 1955 the District Court heard the case on the merits, both petitioner and the government having introduced oral and documentary evidence. The Court entered an order June 15, 1956 (R. 308a) denying the petition to suppress evidence, but without prejudice as to any issues on the competency or incompetency of evidence therein raised.

Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit and that Court on July 5, 1957 affirmed the opinion of the court below. (Appended page 22.)

Petitioner now petitions this Honorable Court to issue a Writ of Certiorari.

SUMMARY STATEMENT OF MATTER INVOLVED.

On or about December 13, 1948 Revenue Agent Krieger had his first conference with the petitioner relative to the tax years 1944, 1945 and 1946.

Early in January 1949 the petitioner and his counsel, Mr. Snider, had a luncheon meeting with the then Collector of Internal Revenue, Giles Kavanagh, who stated that it was just a matter of getting together and determining the tax, and that "as soon as you (the petitioner) can get together with Mr. Snider and the Agent and determine the amount, why, we'll come to a settlement on the case." (R. 156a.) The Collector of Internal Revenue had meetings with petitioner on at least three other occasions, one

occasion being about two weeks before the petitioner turned over the books that are the subject of this action (R. 156a). At that meeting the petitioner asked why his patients were being circularized in view of the fact that the Collector of Internal Revenue had advised the petitioner that the tax case was purely civil. Mr. Kavanagh, the Collector of Internal Revenue, replied, "Pay no attention to it, it is purely a matter to estimate the tax, and we did it with grocers and all other types of investigation of that nature; they wrote purely as a matter to determine the amount of tax," and petitioner should not worry any more about it (R. 158a). Mr. Kavanagh asked him if he had any records he could turn over and the petitioner said he did not know, he would look around and see. Mr. Kavanagh further stated that if he would come up with any further records he should let Mr. Kavanagh know and he assured petitioner that if he did turn in any records they would not be held against him in any way, shape or form; that it was purely a civil case (R. 159a).

Following petitioner's above conversation with Mr. Kavanagh, Mr. Snider asked the petitioner on two or three occasions if he had any additional records, reminding him that he had heard Mr. Kavanagh himself say that if he turned any records over it would help bring the case to a close much quicker (R. 159a). After several conversations with Mr. Snider about the matter, petitioner advised him that if he could assure petitioner that any records he turned over would not be used to prosecute him criminally he would look to see if he could find something helpful (R. 159a). Mr. Snider said that he had that assurance from Mr. Kavanagh and the petitioner said to Mr. Snider, "If you need any consultation in this case at all, now is the time to get it." Mr. Snider replied he would let petitioner know the next day (R. 160a). The next morning he called the peti-

tioner and advised him that he would go over and talk with Mr. Kavanagh and if Mr. Kavanagh again confirmed the fact that it was only a civil case he would again call petitioner (R. 160a). Mr. Snider then went to see Mr. Kavanagh and called petitioner and told him he (Mr. Snider) had Mr. Kavanagh's assurance again, that he had been told by Mr. Kavanagh, "I've told you again, and I've told you many times this is a civil case, and if you have any records turn them in and we will quickly come to a settlement on the case." (R. 160a.)

After receiving that information from Mr. Snider, the petitioner told Mr. Snider that he had two books that he could turn in for 1946 and 1947 (being the Lawyers Handy Books involved in this action); that he had nothing for 1944 or 1945 because he did not collect the accounts at that time (R. 160a). Mr. Snider then called Mr. Kavanagh on the phone (R. 108a) and Mr. Kavanagh told him that he did not want to assume the responsibility of giving Mr. Snider an answer over the phone but stated he would inquire about the books and call Mr. Snider back (R. 108a). He did call Mr. Snider later that same day and stated to Mr. Snider, "Norm, you are now in a position where you are forced to have those books turned over, having knowledge of it, but as far as criminal prosecution is concerned, don't worry about that" (R. 109a). Mr. Snider was satisfied there would be no criminal prosecution and Mr. Kavanagh advised him (R. 109a) that unless he turned over the books or had his client turn them over he would either have to withdraw from the case or lose his Treasury card (giving him the right to practice before the Bureau).

When Mr. Snider then called petitioner he stated there would be no harm in giving the books up and that Mr. Kavanagh "even wanted me to convey to you, Doc, that there is nothing to worry about, that there would be no

criminal prosecution." (R. 110a.) Mr. Snider also stated that in addition to talking to Mr. Kavanagh and receiving his assurance, Mr. Kavanagh asked that he see Mr. Grunewald, head of the Intelligence Division, which he did (R. 115a) because Mr. Kavanagh stated to Mr. Snider that he talked to Mr. Grunewald before he advised Mr. Snider there would be no criminal prosecution if the books were turned over (R. 116a). Mr. Snider saw Mr. Grunewald prior to the time that the books were turned over (R. 117a-118a), and he stated to Mr. Snider that as far as he was concerned there would be no criminal prosecution (R. 120a). After receiving these assurances petitioner brought the books to Mr. Snider's office, laid them on Mr. Snider's desk and Agent Sullivan took possession of them. The books were turned over to the Bureau of Internal Revenue on or about February 24, 1949 (R. 157a).

On or about March 8, 1950 petitioner received a so-called 90-day statutory letter assessing the taxes (R. 57a; Petitioner's Exhibit 5, R. 291a).

In the spring of 1952 Attorneys Cashen and Platt entered negotiations with the Department of Justice in Washington and in the course of the negotiations the officials in Washington asked for a statement from Attorney Snider and later a statement from Giles Kavanagh (R. 26a, 32a). As a result, Attorney Snider prepared a rough draft of an affidavit (R. 93a) which reviewed incidents leading up to and including turning over of the books, which was introduced and received into evidence (Petitioner's Exhibit 9, R. 306a). This rough draft affidavit was taken to Giles Kavanagh to have him check the facts as set forth and to make corrections if there were any discrepancies (R. 94a). The evidence shows that Giles Kavanagh made corrections (R. 94a) on the rough draft of the affidavit in his own handwriting (R. 306a-307a), thereby confirming the

accuracy of the statements therein. The affidavit as corrected by Mr. Kavanagh was then prepared by Attorney Snider and executed by him (R. 96a, Petitioner's Exhibit 2, R. 9a, 10a). Attorney Snider's affidavit was presented to the Justice Department in Washington. After examining this affidavit the Department requested a statement from Giles Kavanagh to confirm the statements made regarding Kavanagh's part in the case at the time of turning the books over to the Government (R. 28a). A statement was then prepared which Kavanagh signed (Petitioner's Exhibit 1, R. 282a) and which was then forwarded to the Department.

Mr. Kavanagh, the former Collector of Internal Revenue, died before the petition was filed in the Court below. The statement which he signed in substance confirmed the allegation of the petition. A photostatic copy of Mr. Kavanagh's signed statement was attached to the petition and was introduced and received in evidence at the trial as Petitioner's Exhibit 1 (R. 282a). In this statement Mr. Kavanagh confirmed the fact that Mr. Snider told him about the existence of the two books and asked him whether petitioner would be safe from prosecution if the books were turned over to the agents to facilitate the determination of civil tax liability. Mr. Kavanagh was under the impression that this was a civil and not a criminal tax case and so advised Mr. Snider. He further advised Mr. Snider that he (Snider) had no alternative but to surrender the books or withdraw from the case. Mr. Kavanagh understood he had no authority to promise immunity in a criminal case. On the other hand, since the Biggs case as he saw it was merely a civil case, Mr. Kavanagh felt it was his duty as Collector to advise Mr. Snider of this fact and to insist that the books be surrendered in the interest of getting the tax determined and paid.

In the early part of March 1953 attorneys for the petitioner were notified that the petitioner's case was being submitted to the Grand Jury which resulted in the filing of the petition in this action.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals for the Sixth Circuit has inconsistently applied rules of law in a manner that completely deprives the petitioner of his constitutional rights. Petitioner filed a pre-indictment petition to suppress evidence claimed to have been obtained by the government improperly and in violation of his constitutional privilege against self-incrimination. The District Court dismissed the petition on the basis that it was prematurely brought, reserving to petitioner the right to assert such defense upon a trial on the merits if indictment was had, relying on *Centracchio v. Garrity*, 198 F. (2d) 382 (1952). On appeal, the Court of Appeals for the Sixth Circuit reversed the District Court and remanded, relying on *In re: Fried*, 161 F. (2d) 453 (1947). On re-trial, the District Court emphatically voiced its disagreement with the order of the Court of Appeals, relying, in addition to *Centracchio v. Garrity, supra*, on *Benes v. Canary*, 224 F. (2d) 470 (1955), also decided by the Court of Appeals for the Sixth Circuit but after the decision on petitioner's prior appeal, and claimed to be inconsistent therewith. The District Court with obvious reluctance summarily entered findings of fact and conclusions of law that no unlawful device was used by the agents of the government and that the evidence sought to be suppressed was not in violation of any of petitioner's constitutional rights. On appeal of this order the Court of Appeals for the Sixth Circuit purported to reverse its position taken in the prior appeal, and in reliance upon its decision in *Benes v. Canary, supra*, the Court of Appeals states:

> "Accordingly, we are of the opinion that the appellant was not entitled to present and litigate in a pre-indictment proceeding the admissibility of the evidence involved in this case and the petition was properly dismissed as a matter of law."

Again the petitioner's constitutional rights as to the merits of his contention were summarily passed over without the careful judicial consideration required in the protection and preservation of individual rights guaranteed by the Constitution. The Court of Appeals stated:

> "However, in case we should be wrong in this conclusion (above quoted), we will briefly consider the case on its merits."

The Court of Appeals, upon obviously summary consideration, found that the findings of the District Court were not clearly erroneous and its judgment was affirmed.

The apparent result of the erroneous judgment of the Court of Appeals sought to be reviewed is that petitioner has been deprived of a realistic judicial consideration of the merits of his claim of violation of his constitutional rights. It is clear that both the District Court and the Court of Appeals felt that petitioner's petition should be dismissed on procedural grounds as prematurely brought, and therefore gave scant attention to evaluation of the evidence pertaining to the merits of petitioner's claim. Nevertheless, the decision of the District Court and the affirmance by the Court of Appeals specifically determines that petitioner's rights have not been violated, and thereby presumably renders such issue *res adjudicata* and precludes a later proper consideration of the evidence relative thereto.

2. Both the Court of Appeals and the District Court erroneously considered this case as one of the many cases in the category testing the validity of the Treasury De-

partment's so-called "voluntary disclosure" policy. All of the cases primarily relied upon and considered as dispositive of the instant case, namely, *Centracchio v. Garrity, supra, Benes v. Canary, supra,* and *Chieftain Pontiac Corp. v. Julian,* 209 F. (2d) 657 (1954), were "voluntary disclosure" policy cases. These cases are basically and fundamentally different from petitioner's case. The Treasury Department published and announced that as a matter of policy it would not recommend criminal prosecution of any taxpayer who voluntarily came in *before* an investigation and disclosed the filing of an erroneous tax return, followed by a correction thereof and payment of any tax deficiency. Many cases arose as a result of this policy (since revoked), including those above cited and relied upon by the District Court and Court of Appeals. In these cases the issues centered around the timeliness and adequacy of the disclosure, as well as legal validity of the policy itself as presenting a defense to a criminal prosecution. The contention of defendants in these cases was that their disclosure was voluntary only to the extent induced by the announced Treasury Department policy, and the use of the disclosed information in criminal prosecution violated their right against self-incrimination. The good faith of the defendants in availing themselves of the Treasury Department policy weighed heavily in the consideration of such cases by the courts.

Petitioner makes no claim of reliance upon the "voluntary disclosure" policy. The entire and uncontradicted evidence in this case shows that such policy had no applicability. The books surrendered by petitioner were produced long *after* the investigation was under way and during the course thereof after many conferences with the Revenue Bureau examiners. These books were produced as a direct result of specific and personal representations

made to him and his attorney that no criminal action was involved; that the books were to be used for the purpose of expediting completion of the examination and assessing the civil liability, if any. The issues and applicable legal principles in petitioner's case and those in the "voluntary disclosure" cases are entirely different, and the District Court and the Court of Appeals substantially erred in not recognizing such distinction and in disposing of petitioner's case on the same considerations prevailing in the "voluntary disclosure" cases.

3. Were the petitioner's case to be considered as being controlled by the same legal principles as prevailing in the "voluntary disclosure" cases, it is to be noted that there is a conflict among the decisions of the several Courts of Appeals as to whether the taxpayer's constitutional rights are violated by using information so disclosed in a criminal proceeding. *Centracchio v. Garrity*, *supra*, and *Benes v. Canary*, *supra*, take the position that no constitutional right is violated by such use. To the contrary, *U. S. v. Shotwell Mfg. Co.*, 225 F. (2d) 394 (1955), held that such use of voluntarily disclosed information violated taxpayer's constitutional rights. The question of taxpayers' constitutional rights in such situation is one of great importance and widespread prevalence, and in great need of determination by the Supreme Court so that the sacred rights of citizens protected by our Constitution may be preserved. The conflict in the decisions by the several Courts of Appeals should be resolved by the Supreme Court in order to lend certainty in this controversial field of law.

4. We have hereinbefore pointed out the lack of realistic judicial consideration of the evidence in this case. This results in part from the apparent feeling of both the District Court and the Court of Appeals that petitioner's

original petition should be dismissed as a procedural matter because of being prematurely brought, and hence slight attention was given to a weighing and evaluating of the evidence. When coupled with an erroneous viewing of the evidence in the light of the rules and legal principles applicable to "voluntary disclosure" cases without distinguishing such cases from the basically different type of case presented by petitioner's original petition, an almost total lack of proper judicial determination of pertinent facts inevitably results. In such circumstance, the petitioner's constitutional rights are effectually denied without judicial process, and the findings of fact and conclusion of law cannot be said to be properly founded. Such error is compounded by the finding of the Court of Appeals that the findings of the District Court were not "clearly erroneous." The enormity of prejudice to petitioner's rights by such casual consideration of the evidence is disclosed by the ignoring of the controlling and most persuasive, impartial, uncontradicted and written evidence adduced at the trial before the District Court, namely, the affidavit of Giles Kavanagh, Collector of Internal Revenue (Petitioner's Exhibit No. 1, R. 282a) and his further handwritten correction of Snider's affidavit draft (Petitioner's Exhibit No. 9, R. 306a). This evidence in and of itself shows the inference of promised immunity: the representation of use in civil proceedings only of the requested books, causing the petitioner to surrender his records only for the represented purpose of civil settlement after refusal to disclose possibly self-incriminating records for use in any criminal action; and the added force and pressure of threatening petitioner with the forced withdrawal of his attorney from further representation. In the light of such evidence, it is inconceivable that the District Court could conclude that the constitutional rights of petitioner

were not violated. The decision of the Court of Appeals that such conclusion was not "clearly erroneous" further demonstrates the extent of prejudice to petitioner's rights guaranteed by the Constitution. The error of such judgment is so apparent and substantial that the intervention of the Supreme Court is required and merited that so great a threatened miscarriage of justice is avoided and the constitutional protection of our citizenry assured.

CONCLUSION.

For the reasons above indicated, it is respectfully suggested that in the exercise of sound judicial discretion, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS.

(Decided July 5, 1957.)

Before: SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

MILLER, Circuit Judge. The appellant, Raymond A. Biggs, filed a petition in the District Court seeking to suppress certain documentary evidence which the petition claims was obtained from him in violation of his rights guaranteed under the Fifth Amendment to the Constitution of the United States which provides that no person "shall be compelled in any criminal case to be a witness against himself." It was alleged that the District Attorney intended to present to the Grand Jury the evidence so obtained in order to obtain an indictment against the appellant for violation of the Internal Revenue Laws in the filing of income tax returns for the years 1946 and 1947.

The petition alleged that about the middle of February 1949 a revenue agent and a special agent of the Intelligence Unit of the Bureau of Internal Revenue, who were investigating the income tax affairs of the appellant, requested permission to examine appellant's records showing the amount of fees received by him during the taxable years of 1946 and 1947; that appellant, after consulting his attorney, informed his attorney that he would not under any circumstances turn over certain books that he had, showing records of professional receipts for the years in question unless he had absolute assurance that he would not be prosecuted for violation of any laws of the United States; that appellant's attorney so informed Giles Kavanagh, the then Collector of Internal Revenue at Detroit, Michigan, who after looking into the matter, advised the attorney that the Government did not consider appellant's

case an appropriate one for prosecution and that appellant would be safe turning over his books in order to facilitate the determination and payment of appellant's tax liability; that appellant, upon being advised by his attorney of this assurance, delivered to the Internal Revenue Agent and Special Agent investigating the case, two Lawyer's Handy Books, one for 1946 and the other for 1947, which contained the names of patients and the amounts collected day by day during those years; that after obtaining such books the investigating agents used the information contained therein as a basis for a recommendation of prosecution of the appellant; and that said information was turned over to the United States Attorney who intended to present it to the Grand Jury as a basis for an indictment to be returned against the appellant. The petition prayed that an order be entered restraining the United States Attorney from using as evidence before the Grand Jury or in any criminal prosecution of the appellant, the said books of the appellant or any information obtained directly or indirectly from the books, and that the books and any information obtained from them be suppressed as evidence in any criminal prosecution of the appellant. Appellant filed in support of the petition Exhibit "A," being the affidavit of his attorney, and Exhibit "B," being a statement of Giles Kavanagh, since deceased.

The Government filed a motion to dismiss the petition on the grounds (1) that the petition was lacking in equity and (2) that the issue was prematurely raised.

The District Judge was of the opinion, in accordance with the views expressed in *Centracchio v. Garrity*, 198 F. (2) 382, C. A. 1st, cert. denied, 344 U. S. 866, that there was no authority sanctioning judicial interference of this nature with the action of a United States Attorney in the administration of criminal law, *at a pre-indictment* stage,

in other than search and seizure cases, and dismissed the petition for want of equity. On the same day, but after the entry of the order, an indictment was returned against appellant for income tax violations for the years 1946 and 1947.

On appeal to this Court from the order dismissing the petition, an order was entered on February 19, 1954, denying the Government's motion to dismiss the appeal, reliance being placed upon *In re: Fried*, 161 F. (2) 453, C. A. 2nd, cert. granted, 331 U. S. 804, writ dismissed on motion of counsel for the petitioner, 332 U. S. 807. The cause was remanded to the District Court with instructions to pass upon the merits of the motion.

Following the hearing in the District Court, the District Court ruled that the evidence sought to be suppressed was not obtained in violation of any of petitioner's constitutional rights and denied the petition to suppress, but without prejudice to petitioner's right to challenge at the trial the competency or incompetency of the evidence sought to be suppressed. The case is again before us on this second appeal.

Since our order of February 19, 1954, on the prior appeal, we have had presented to us and ruled upon the general question of pre-indictment motions to suppress evidence. *Benes v. Canary*, 224 F. (2) 470, C. A. 6th, cert. denied, 350 U. S. 913. In that case we cited with approval *Centracchio v. Garrity*, *supra*, and *Chieftain Pontiac Corp. v. Julian*, 209 F. (2) 657, C. A. 1st, which hold that under Rule 41(e), Federal Rules of Criminal Procedure pre-indictment petitions for the suppression of evidence are authorized only in cases where the evidence comes into the possession of the authorities in consequence of an unlawful search and seizure forbidden by the Fourth Amendment. We ruled as premature and refused to consider so much

of the motion to suppress in that case as was based upon the contention that the evidence had been improperly obtained by the Government through reliance by the petitioning taxpayer upon the Treasury's "voluntary disclosure" policy, which the Government, after obtaining the evidence, was not adhering to. The issues in that case and the present case are analogous.

The Second Circuit in *In re: Fried, supra*, makes an exception to the general rule, approved by us in *Benes v. Canary, supra*, by broadening the scope of pre-indictment petitions to suppress to include cases involving violations of constitutional rights under the Fifth Amendment as well as under the Fourth Amendment. The three separate opinions of the three members of the Court indicate the restricted type of case to which the exception was made applicable, one member of the Court approving the exception only in cases involving a violation of the petitioner's constitutional rights under the Fifth Amendment, and another member of the Court refusing to approve the exception even in its restricted application. That case involved a confession obtained by threats of physical violence and "third degree" police methods, a factual situation far different from the one disclosed in this case. See also: *United States v. Sineiro*, 190 F. (2) 397, 193 F. (2) 136, C. A. 3rd, cert. denied, 343 U. S. 904.

Since the exception made to the general rule in *In re: Fried, supra*, is limited to cases involving petitioner's constitutional rights under the Fifth Amendment, there may be considerable doubt of its applicability to the present case. Accepting the allegations in appellant's petition at their face value, the evidence may be inadmissible but not because it involves a violation of constitutional rights. *Chieftain Pontiac Corp. v Julian, supra*, 209 F. (2) 657, 659-660, C. A. 1st; *Brink v. United States*, 148 F. (2) 325, 328, C. A. 6th; *United States v. Klapholz*, 230 F. (2) 494,

496-497, C. A. 2nd, cert. denied, 351 U. S. 924. Compare: *McNabb v. United States*, 318 U. S. 332; *Upshaw v. United States*, 335 U. S. 410; *Nardone v. United States*, 302 U. S. 379, where incriminating statements made by the defendants were held inadmissible because of statutory violations rather than on constitutional grounds, and *Sorrells v. United States*, 287 U. S. 435, involving the defense of entrapment. Actually, it is questionable whether the petitioner can even successfully prevent the use of such evidence when it is offered at the trial. *Olmstead v. United States*, 277 U. S. 438, 468; *Grimm v. United States*, 156 U. S. 604, 610; *On Lee v. United States*, 343 U. S. 747, 757-758; *Goldman v. United States*, 316 U. S. 129, 135; *Whiskey cases*, 9 Otto 594; *Wellmann v. United States*, 227 F. (2) 757, 770, C. A. 6th; *O'Malley v. United States*, 128 F. (2) 676, 684-685, C. A. 8th; *Mattes v. United States*, 79 F. (2) 127, C. A. 3rd. See: *Irvine v. California*, 347 U. S. 128, 134-135. However, we do not here attempt to answer such questions, but merely refer to them as part of the background against which our question must be considered.

There is no attempt in the present case to deprive the appellant of any rights which he might have to prevent the use of evidence complained of in the prosecution of the pending indictment against him. It is a question of procedure rather than one of substantive law. When and in what manner the objection to its use is to be made is the question involved.

We think this question is controlled by Rule 41(e), Federal Rules of Criminal Procedure. There, dealing with motions to suppress evidence before trial the procedure is limited to evidence obtained by unlawful search and seizure, involving the Fourth Amendment. Questions involving the Fifth Amendment are not included. The reasons for not including questions involving self-incrimination under the Fifth Amendment are well explained in *Centrac-*

chio v. Garrity, supra, and in the concurring and dissenting opinions in *In re: Fried, supra.* As pointed out in the opinions in those cases it seems reasonable to conclude that the failure of the rule to make any provision for the suppression of confessions before trial meant that it was intended that such questions, similar to questions about the competency of other evidence, be dealt with at the trial by the tribunal before which they were sought to be introduced. If it is advisable that the rule be broadened in scope, it should be accomplished through the authorized procedure for amending the rules, rather than by judicial decision. The Supreme Court has not indicated its approval of such an amendment or of the construction given to the rule by *In re: Fried, supra.* Accordingly, we are of the opinion that the appellant was not entitled to present and litigate in a pre-indictment proceeding the admissibility of the evidence involved in this case and the petition was properly dismissed as a matter of law.

However, in case we should be wrong in this conclusion, we will briefly consider the case on its merits. Appellant is, of course, entitled to the protection afforded him by the Fifth Amendment. If the books were delivered by him to the government agents involuntarily, such as by reason of force or intimidation, they can not be used as evidence against him. *In re: Fried, supra,* 161 F. (2) 453, C. A. 2nd; *United States v. Abrams,* 230 F. 313, D. C. Vt.; *United States v. Wolrich,* 129 F. Supp. 528, S. D., N. Y. Appellant contends that the same rule is applicable if he made a voluntary disclosure in reliance upon promises of immunity from criminal prosecution. *United States v. Shotwell Manufacturing Co.,* 225 F. (2) 394, 406, C. A. 7th; *In re: Liebster,* 91 F. Supp. 814, E. D. Pa. See: *Brink v. United States, supra* 148 F. (2) 325, 328, C. A. 6th; *Centracchio v. Garrity, supra,* 198 F. (2) 382, 388, C. A.

1st; *McNabb v. United States, supra,* 318 U. S. 332, 341. Compare: *United States v. Shotwell Manufacturing Co., supra,* 225 F. (2) 394, dissenting opinion at page 406. It was unnecessary for us to rule on the question in *Benes v. Canary, supra,* 224 F. (2) 470, 473, C. A. 6th. Assuming, without deciding, that the contention is well taken, we are nevertheless of the opinion that the judgment should be affirmed.

It is settled law that the privilege against self-incrimination does not preclude the admission into evidence of documents voluntarily given to a revenue agent in a civil tax investigation without promise of immunity and in the absence of fraud or misrepresentation, even though the taxpayer did not anticipate criminal prosecution. *White v. United States,* 194 F. (2) 215, C. A. 5th; *United States v. Wolrich,* 119 F. Supp. 538, S. D. N. Y.; *Moyer v. Brownell,* 137 F. Supp. 594, 608-610, E. D. Pa.

Whether the books were voluntarily surrendered by the appellant or were obtained under a promise of immunity or through fraud or misrepresentation on the part of the Government is a question of fact. The District Judge in his opinion reviewed the evidence in detail and found that the surrender of the two books by petitioner was voluntary, uninduced by any threats, promises or assurances made to him directly by any agent or official of the Bureau of Internal Revenue and that no fraud, trickery or any unlawful device was used by agents of the government in obtaining the evidence which is sought to be suppressed. These findings are not clearly erroneous, and must be accepted on this appeal. Based on these findings, the District Court's ruling that the evidence sought to be suppressed was not obtained in violation of any of petitioner's constitutional rights, is not erroneous.

The judgment is affirmed.

JUDGMENT OF THE COURT OF APPEALS.

(Filed July 5, 1957.)

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.